LaGrand: A Challenge to the U.S. Judiciary

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In international practice, consuls aid their nationals detained on criminal charges in a variety of ways. They may recommend appropriate defense attorneys, explain detaining states' criminal justice systems to detainees, and facilitate the location of documentary evidence or witnesses from the home state. More generally, they ensure, by their very presence, that police and other authorities treat their nationals fairly. Like their colleagues from other states, U.S. consuls perform such functions for detained U.S. nationals. Furthermore, the United States has more consuls than any other state, hence more to gain from the strict observance of the right of consular access.

Implementation of the right of consular access for foreign nationals detained in the United States has been problematic, however, because the police and other local authorities are frequently unaware of the foreign national detainee's right to such access and often fail to inform him or her of it. A number of foreign nationals have been sentenced to death in state courts in such situations. These cases have elicited diplomatic protest from the foreign detainees' states of nationality.

For foreign-national defendants convicted of a capital offense, consular functions are particularly significant during penalty proceedings in which courts determine whether capital punishment will be applied, with both the prosecution and defendants presenting a broad range of information about the defendant's background and extenuating circumstances. For foreign-national defendants, such information is often to be found in their home states, and U.S. defense attorneys have frequently been unable, for financial or practical reasons, to obtain it. A consul may be able to find information, for example, about an early-childhood brain injury that would be relevant to the decision on the application of capital punishment.

In *LaGrand*, Arizona executed two German nationals after failing to follow Vienna Convention requirements. Looking to the future, the International Court of Justice (ICJ) said that,

> [I]f the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the

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> conviction and sentence by taking account of the violation of the rights set forth in the Convention.[1]

The *LaGrand* judgment poses a challenge because the ICJ is at odds with U.S. courts on its view of the consequences of violating Article 36 of the Vienna Convention. U.S. courts have been reluctant to reverse convictions: federal circuit courts and state supreme courts have rejected Article 36 claims, ruling variously that Article 36 provides no right that may be invoked by individual foreign-national detainees in the courts of the prosecuting state;[2] that Article 36 requires no judicial remedy even if it does provide such an individual right;[3] or that judicial remedy is required only if the foreign national would have been acquitted had the individual received proper Article 36 notification.[4]

The conflict of views is even more evident in the opinions of the respective courts. The U.S. Supreme Court has not yet given full treatment to a case involving an Article 36 claim. The only case in which it has indicated a view is *Breard v. Greene*,[5] which involved a Paraguayan national about to be executed in Virginia. The Court heard the case on an eleventh-hour motion to stay Breard's execution and decided the matter without full briefing or argument. Moreover, Breard had not raised his Article 36 claim in Virginia state courts. With a six-justice majority, the Court rejected Breard's motion for a stay of execution on the ground that the issue had been defaulted since it had not been raised in the Virginia courts. In dictum, the majority went on to say that had there been no default, Breard would still have had to establish that the violation of his Article 36 rights prejudiced him. Breard's conviction, as they saw it, would stand unless "the violation had an effect on the trial."[6]

The ICJ disagrees with the U.S. Supreme Court on both the holding and the dictum in *Breard*. The procedural default rule of the U.S. judicial system, it said, cannot be applied to avoid providing a remedy in Article 36 cases because the United States has an obligation to carry out its Vienna Convention responsibilities.[7] As for remedy, the ICJ said that it was "immaterial . . . whether a different verdict would have been rendered" had the LaGrand brothers enjoyed consular assistance.[8]

Professor Fitzpatrick in this symposium suggests that what remedy needs to be provided in a particular case depends on the actual harm that resulted from the failure to notify the detainee. She aptly notes, however, that

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1. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶ 125 (June 27), available at http://www.icj-cij.org.

2. United States v. Li, 206 F.3d 56, 66 (1st Cir.), *cert. denied*, 531 U.S. 956 (2000); State v. Martinez-Rodriguez, 33 P.3d 267, 274 (N.M. 2001).

3. *See* United States v. Bustos de la Pava, 268 F.3d 157, 165 (2d Cir. 2001); United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir.), *cert. denied*, 531 U.S. 991 (2000).

4. *See* Breard v. Greene, 523 U.S. 371 (1998).

5. *Id.*

6. *Id.* at 377.

7. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶ 91 (June 27), available at http://www.icj-cij.org.

8. *Id.* ¶ 74.

the harm "is often indeterminable."[9] U.S. courts that have tried to assess harm in particular cases have uniformly concluded that harm could not be demonstrated. A requirement that specific harm be identified is tantamount to rejecting most Article 36 claims. The ICJ's approach to this issue is, as explained above, that such actual harm is immaterial. In other words, in the face of a failure to notify, a conviction must be reversed. This is a straightforward application of the requirement, in the law of state responsibility, of restoring the status quo before a violation. When the ICJ requires the "review and reconsideration" of a conviction and sentence,[10] it is requiring reversal, without regard to whether consular assistance would have affected the result in the trial court.

The ICJ specifies what the United States must do in future cases, although perhaps not in as strong language as some would have liked. Mr. Tams in this symposium writes that the court recognized a state's right to assurances of non-repetition.[11] While the court entertained and considered Germany's request for such assurances, it did not require the United States to provide any. Germany had sought assurances on two points: first, that German nationals detained in the United States in the future would be notified of their right of consular access, and second, that German nationals convicted in the United States in the future following noncompliance would be entitled to reversal of the conviction. Responding to the first point, the court said that the United States, by explaining to the court its efforts to secure better compliance by the police, had already met Germany's request.[12] On the second point, the court responded by explaining the United States' obligation in the future if a German national is convicted and sentenced after not being given the information required by Article 36. No assurance, however, was specifically ordered by the court, presumably out of concern that if it ordered assurances, the United States might refuse to provide them. The court may also have considered that the United States would be more likely to comply in the future with its Vienna Convention obligations if the court simply set out, as it did, what it finds those obligations to be.

Another point of disagreement between the ICJ and the U.S. Supreme Court relates to the rights of individual detainees under the Vienna Convention. The ICJ concludes that Article 36 confers a right not only on the detainee's state of nationality, but also on the detainee personally. The ICJ found this right in a sentence in Article 36 that requires the authorities to "inform the person concerned without delay of *his rights* under this subparagraph."[13] The U.S. Supreme Court's position, however, is much more

9. Joan Fitzpatrick, *The Unreality of International Law in the United States and the* LaGrand *Case*, 27 YALE J. INT'L L. 427, 431 (2002).

10. *LaGrand*, ¶ 125.

11. Christian J. Tams, *Recognizing Guarantees and Assurances of Non-Repetition:* LaGrand *and the Law of State Responsibility*, 27 YALE J. INT'L L. 441, 441 (2002).

12. *Id.* ¶ 124.

13. *Id.* ¶ 77 (emphasis added).

ambiguous, with the Court stating that Article 36 "arguably confers" a right on the individual detainee.[14]

The ICJ's conclusions concur, on key points, with those expressed in a 1999 advisory opinion on consular access issued by the Inter-American Court of Human Rights. Acting on a request from Mexico about the applicability of Article 36 in capital cases, the Inter-American Court rendered an opinion in which it construed Article 36 to preclude an execution following upon a violation of the obligation to advise a foreign national of the right of consular access.[15] Moreover, the opinions issued by the ICJ and by the Inter-American Court provide an interpretation of the Article 36 obligation that is consistent with established principles of treaty law and the law of state responsibility that supplements treaty law on the issue of remedies for breach. It is fundamental to the international legal order that a state violating a treaty obligation must remedy its breach.

The ICJ's judgment, it must also be noted, is binding on the United States under United Nations Charter Article 94, by which member states undertake to comply with a decision of the ICJ in a case to which they are a party. Technically, Article 94 requires the United States to comply with the court's decision only vis-à-vis Germany, but it would be difficult for the U.S. Supreme Court to construe Article 36's requirements differently based solely on the nationality of the foreign detainee.

Irrespective of whether the ICJ's judgment is binding on the United States, however, the ICJ's reasoning should recommend itself to the U.S. Supreme Court. The U.S. Supreme Court formulated its position on Article 36 under time pressure and without full briefing. The ICJ, by contrast, conducted a full review, with leading international lawyers representing Germany and the United States. Thus, on the issue of procedural default, the U.S. Supreme Court should adopt the ICJ view that the rule is inapplicable when its use puts the United States in violation of a treaty obligation. On the issue of the impact of an Article 36 violation on the outcome of a criminal trial, the Supreme Court should entertain full argument on the role and importance of consular assistance to foreign detainees. Such an exercise might well lead the Supreme Court to agree with the ICJ that a remedy is required even when it cannot be demonstrated that consular assistance would have changed the trial result.

The *LaGrand* judgment presents a different challenge to U.S. courts on the separate issue of the legal nature of the court's interim measures. In both the *Breard* and *LaGrand* cases, U.S. courts ignored interim measures in which the ICJ called on the United States to halt execution pending its final judgment. The United States argued that the term "ought" in Article 41 of the ICJ Statute is weaker than "must" and, consequently, that Article 41 does not contemplate interim measures to be more than recommendations.[16] The ICJ

14. Breard v. Greene, 523 U.S. 371, 376 (1998) (stating that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest").

15. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. C.H.R. (ser. A) No. 16 (1999), ¶ 141.

16. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶ 100 (June 27), *available at* http://www.icj-

reacted by focusing on the statute's equally authentic French text, which, where the English reads "ought," uses a verb—*devoir*—that carries with it a sense of duty. The court thus found a linguistic divergence that, it said, needed to be reconciled, "having regard to the object and purpose of the [ICJ Statute]."[17] Part of that object and purpose is that the court issues final binding judgments to determine the rights of the parties. If, after an application is filed, the court determines that a party must refrain from certain actions to allow it subsequently to comply with a potential adverse ruling, then refraining from such action is necessary to preserve the court's ability to carry out the object and purpose of the statute.[18]

The ICJ's ruling on the binding effect of interim measures is consistent with long-held principles of international law. While the court did not refer to the work of publicists, prominent analysts have said that interim measures are binding for precisely the reason to which the court referred.[19] The court itself had, prior to *LaGrand*, never explicitly ruled that interim measures are binding, since no party had previously asked the court for a judgment that a violation of interim measures by an opposing party was wrongful. In one previous case, however, the court had acted in a fashion suggesting that it considered interim measures to be binding. In the genocide case between Bosnia-Herzegovina and Yugoslavia, the ICJ ordered interim measures against Yugoslavia in April 1993. When Yugoslavia did not comply, the court reiterated its interim measures in September 1993. Although the court did not explicitly address the character of interim measures, its second call on Yugoslavia implied that it considered such measures to impose direct, binding obligations on Yugoslavia. In addition, one judge addressed in a separate opinion the issue of the character of interim measures and stated, consistent with what the full court said in *LaGrand*, that such measures are binding.[20]

The ICJ's ruling in *LaGrand* that interim measures are binding is sound as a matter of treaty interpretation. If a court cannot, by issuing orders of an injunctive character, preserve its own ability to render a final, binding judgment, then its ability to render a final, binding judgment is illusory. If in

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17. *Id.* ¶ 101.

18. *Id.* ¶ 102.

19. *See* SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 548 (1986) ("The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding—for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court."); MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, at 426 (1943) ("[I]f [a state] is a party to a treaty which provides for the Court's exercise of its functions, it has admitted the powers which are included in the judicial process entrusted to the Court. It would seem to follow that such a State is under an obligation to respect the Court's indication of provisional measures; in other words, as a party before the Court such a State has an obligation, to the extent that the matter lies within its power, to take the measures indicated."); JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 132 (1959) (stating that an obligation to comply with interim measures derives from "mere acceptance of the Statute").

20. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Mont.)), 1993 I.C.J. 325 (Provisional Measures Order of Sept. 13) (separate opinion of Vice-President Weeramantry).

the future the ICJ indicates interim measures against the United States in a Vienna Convention case, U.S. courts, state and federal, should honor those measures, lest they put the United States in violation of its obligation to comply with interim measures and of its obligation under the Vienna Convention.

If a final decision on carrying out capital punishment in such a case rests with a state governor, and if the governor is prepared to let the execution proceed despite the treaty violation, the U.S. Attorney General should sue in federal court to enjoin the execution. Contrary opinion notwithstanding,[21] considerations of federalism do not require federal abstinence. The U.S. Attorney General has sued local governments that put the United States in violation of a treaty commitment.[22] In order to meet its Vienna Convention commitment, the United States must ensure that state governments comply.

Reciprocity is at the heart of any treaty regime. The interests of U.S. nationals abroad are jeopardized by the position the Supreme Court took in *Breard*. This issue is eloquently set forth in a dissenting opinion by an Ohio judge who voted to reverse a capital murder conviction for an Article 36 violation without requiring a demonstration of harm from the denial of consular access. As the judge writes:

> Our best way to ensure that other nations honor the treaty by providing consular access to our nationals is to demand strict adherence to the right to consular access for foreigners in *our* country . . . . If the United States fails in its responsibilities under the convention, then other member countries may choose to do unto us as we have done unto them.[23]

21. See Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998) (stating that principles of federalism must be observed in U.S. implementation of international obligations).

22. United States v. County of Arlington, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982) (suing successfully a county that imposed a tax on a foreign state's diplomatic establishment, in violation of treaty obligation).

23. State of Ohio v. Issa, 752 N.E.2d 904, 935 (Ohio 2001) (Stratton, J., dissenting) (emphasis added).